Supreme Court, U.S.
FILED

95 417 SEP . 2 1995

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1995

ROBERT VENCIUS and DOROTHY VENCIUS,

Petitioners,

v.

MORANIA OIL TANKER CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION - SECOND DEPARTMENT

ALEXANDER J. WULWICK
Counsel of Record for Petitioners
233 Broadway
New York, New York 10279
(212) 732-6566

37 pp

QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, a shipowner may be held concurrently liable for negligence with the employer of a longshoreman who is injured while descending the ship's ladder, which was improperly secured in violation of an OSHA shipyard regulation governing access to and from the ship by ladder.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTIONAL STATEMENT	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	8
CERTIORARI SHOULD BE GRANTED SO THAT THE COURT MAY SETTLE THE QUESTION OF WHETHER THE POSITIVE DUTY ON THE SHIPOWNER TO SUPPLY, INSPECT, AND MAINTAIN THE MEANS OF ACCESS TO AND FROM THE SHIP, AS CONTAINED IN OSHA REGULATIONS, SUBJECTS IT TO CONCURRENT LIABILITY IN NEGLIGENCE, NOTWITHSTANDING THAT OSHA REGULATIONS PLACE PRIMARY RESPONSIBILITY ON THE EMPLOYER DURING STEVEDORING OPERATIONS	8
CONCLUSION	16

APPENDIX	Page
Decision and Order	A1
Motion For Leave To Appeal	A7
Text of Statutes Involved	A9

TABLE OF AUTHORITIES

Cases	Page
Arthur v. Floata Mercante Gran Central, 487 F.2d 561, 562 (5th Cir. 1974).....	11
Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (1977).....	14,15
DiRago v. American Export Lines, Inc., 636 F.2d 860, 865 (3d Cir. 1981).....	12-13
Howlett v. Birkdale Shipping Co., ____ U.S. ____, 114 S.Ct. 2057 (1994).....	14
Lieggi v. Maritime Co. of the Philippines, "M/V Philippine Rizal", 667 F.2d 324 (2d Cir. 1981)	9,12,13
Reyes v. Marine Enterprises, 494 F.2d 866, 870 (1st Cir. 1974)	11,12
Sarauw v. Oceanic Navigation Corp., 655 F.2d 526, 528 (3d Cir. 1981) cert. denied, 456 U.S. 914 (1982).....	12
Stockstill v. Gypsum Transportation, 607 F.2d 1112 (1979), cert. denied, 451 U.S. 969 (1981).....	14,15

The Admiral Peoples, 294 U.S. 649, 651-52 (1935) 11

Tragni v. Establissement Maritine Camille, 705 F.2d 92 (2d Cir. 1983)..... 10

Tullis v. Fidelity and Casualty Co. of N.Y., 397 F.2d 22, 24 (5th Cir. 1958)..... 11

Statutes

29 CFR 1915.3 2

29 CFR 1915.72 2,7

29 CFR 1915.74 2,7

29 CFR 2915.4(b)..... 2

33 U.S.C. 905(b)..... 2

33 U.S.C. 941(a) 2

CPLR 4404(1)..... 5

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT VENCIUS and DOROTHY VENCIUS,

Petitioners,

- against -

MORANIA OIL TANKER CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Robert Vencius and his wife, Dorothy Vencius, respectfully pray that a writ of certiorari issue to review the order of the New York Supreme Court, Appellate Division, Second Judicial Department, dated and entered December 5, 1994.

OPINION BELOW

The opinion of the Appellate Division, Second Department, is reported at 210 A.D.2d 219, 619 N.Y.S.2d 336 (2d Dept. 1995).

JURISDICTIONAL STATEMENT

The decision and order of the Appellate Division, Second Department, was entered on December 5, 1994. Leave to appeal to the Court of Appeals of the State of New York was denied in an order dated and entered June 14, 1995. This Court has jurisdiction to review the order in question under 28 U.S.C. §1254(1).

STATUTES INVOLVED

33 U.S.C. §905(b); 941(a).

29 CFR §§1915.3; 1915.4(b) and (c); 1915.72; 1915.74.

STATEMENT OF THE CASE

Petitioner Robert Vencius, a longshoreman, was assigned by his employer to perform engine repair work on a barge owned by defendant Morania Oil Tanker Corp. The only means of access to and from the barge was a 25-30-foot ladder, which was secured to the ship only by a loosely tied nylon rope at the top of the ladder. The bottom of the ladder rested on the pier and was not secured. On the day of the accident, as petitioner was descending the ladder, the ladder moved sharply to one side and caused petitioner to dangle from the ladder by his left arm with all his weight resting on that arm, thereby causing him to suffer serious injuries.

Testimony at trial by respondent's shipyard manager was to the effect that its practice of securing the ladder to the pier differed depending on who was boarding the barge. If a shipyard employee, the ladder would be securely tied and chocked at the bottom, but if an outside vendor or a contractor making a service call, such as petitioner, the ladder would be attached at the top by the rope, as was done here.

Petitioner's case rested in part on his claim that respondent's failure to secure the ladder at the bottom was a violation of federal shipyard regulations embodied in the Occupational Safety and Health Administration (OSHA) regulations applicable to maritime situations. Petitioner's expert

in such matters would have testified at trial that defendant violated the regulations (see 341 of the Record on Appeal before the Appellate Division). Petitioner, however, was precluded by the trial court from referring to the regulations in his opening statement, and his expert witness was likewise precluded from mentioning them in any way (see id., pp. 10-12, 194-200). These trial rulings were based on the ground that the regulations were applicable only to petitioner's employer, not to the respondent shipowner.

In a post-trial motion to set aside the verdict and for a new trial, pursuant to New York Civil Practice Law and Rules §4404(1), one the grounds advanced by petitioner was "that the

[petitioner] was erroneously precluded from proving the application of OSHA regulations..." (RA, p. 10). In petitioner's supporting affirmation, he stated that his "attorney, prior to openings, was advised by the Court, that OSHA regulations were not applicable to [respondent] and that the [petitioner's] attorney should not mention them to the jury" (id., p. 11), and that "[l]ater, the Court refused to permit [petitioner's] expert to mention the OSHA regulation" (id.). In addition, "[t]he court also refused to charge any violation of OSHA regulations" (id., p. 12), ruling "that OSHA regulations would only apply to Morania's employees" (id.; see also id., p. 13).

The trial court denied petitioner's motion (id., p. 17).

The regulations in question here provide in pertinent part that "[p]ortable ladders shall be lashed, blocked or otherwise secured to prevent their being displaced." 29 CFR §1915.72; and see id., §1915.74(a)(1)(c)(2).

As can be seen from the above, the federal question sought to be reviewed was first raised before the trial court, and it was preserved for review in the Appellate Division, as can be seen from that court's decision and order in the case.

ARGUMENT

CERTIORARI SHOULD BE GRANTED SO THAT THE COURT MAY SETTLE THE QUESTION OF WHETHER THE POSITIVE DUTY ON THE SHIPOWNER TO SUPPLY, INSPECT, AND MAINTAIN THE MEANS OF ACCESS TO AND FROM THE SHIP, AS CONTAINED IN OSHA REGULATIONS, SUBJECTS IT TO CONCURRENT LIABILITY IN NEGLIGENCE, NOTWITHSTANDING THAT OSHA REGULATIONS PLACE PRIMARY RESPONSIBILITY ON THE EMPLOYER DURING STEVEDORING OPERATIONS.

The Appellate Division, in affirming the trial court's refusal to charge the jury on the applicability of the regulations or to allow petitioners' expert to testify concerning the regulations, held as a matter of law that responsibility for compliance with OSHA regulations lies with the employer of the longshoreman, not with the shipowner, despite the positive duty on the shipowner to supply, inspect, and maintain the means of access to and from the ship.

In Lieggi v. Maritime Co. of the Philippines, "M/V Philippine Rizal,", 667 F.2d 324 (2d Cir. 1981), the Second Circuit held that "if both the shipowner and the stevedore neglect their duties they may be concurrently negligent" (id., at 328, fn. 8) and that "the owner's ability to escape liability by reliance on the stevedore is not limitless" (id., at 328). Moreover, the court declared

> that if the shipowner knows of the dangerous condition and should anticipate that, even if the condition is obvious, the stevedore will not or cannot correct it and the longshoremen will not or cannot avoid it, the shipowner has a duty to take reasonable steps to eliminate or correct the condition. Evans v. Transportation Maritime SS "Campeche", supra [639 F.2d] at 855-56 [2d Cir. 1981].

667 F.2d at 328.

In Tragni v. Establissement Maritine Camille, 705 F.2d 92 (2d Cir. 1983), the court said (id., at 93):

> [T]he owner is not absolved from liability if it is at fault also. Indeed, we have explicitly held that if the stevedore and shipowner are both guilty of nonperformance of their duties, they may be concurrently negligent. Lieggi v. Maritime Co. of the Philippines, "M/V Philippine Rizal", 667 F.2d 324, 328 & n.8 (2d Cir. 1981).

The court in Tragni (705 F.2d at 93-94) also cited to 29 CFR §1918.2(b) (1982), which states that the regulations "do not relieve vessels 'from responsibilities or duties now placed upon them by law, regulation or custom'", notwithstanding that the OSHA regulations place primary responsibility on the employer-stevedore during stevedoring operations.

Under federal maritime law, the means of ingress and egress, by whomever furnished, are an appurtenance of the vessel, which the shipowner has the duty to supply, inspect, and maintain. The Admiral Peoples, 295 U.S. 649, 651-52 (1935); Reyes v. Marine Enterprises, 494 F.2d 866, 870 (1st Cir. 1974). A shipowner must provide a reasonably safe means of access to and from his vessel. Tullis v. Fidelity and Casualty Co. of N.Y., 397 F.2d 22, 24 (5th Cir. 1958); Arthur v. Floata Mercante Gran Central, 487 F.2d 561, 562 (5th Cir. 1974).

The shipowner has the duty to exercise reasonable care with regard to the ladder and to make sure it is properly secured to the vessel and maintained in safe condition for

use. See, Sarauw v. Oceanic Navigation Corp., 655 F.2d 526, 528 (3d Cir. 1981), cert. denied, 456 U.S. 914 (1982) (shipowner responsible to longshoreman for unsecured gangway even if supplied by stevedores); Reyes v. Marine Enterprises, supra, 494 F.2d at 869 (shipowner responsible to longshoreman injured by defective gangway even if supplied by third parties).

In light of (1) the liberal approach taken by the Second Circuit toward the shipowner's potential liability under OSHA regulations for hazardous conditions aboard ship (see, Lieggi v. Maritime Co. of the Philippines, supra, 667 F.2d at 328; see also, DiRago v. American Export Lines, Inc., 636 F.2d 860, 865 (3d

Cir. 1981]); (2) the above-stated postive duty on the shipowner to supply, inspect, and maintain the means of ingress and egress; and (3) the reliance by the Appellate Division on Fifth Circuit cases in affirming the trial court's view that responsibility for complying with the OSHA regulations in question here -- concerning the means of ingress and egress by ladder -- was solely on the employer as a matter of law, we submit that certiorari should be granted so that this Court can make a defintive ruling on the issue (see, Lieggi, supra, 667 F.2d at 328).

We note that this issue was not addressed by the Court in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), or in

Howlett v. Birkdale Shipping Co., S.A., ____ U.S. ____, 114 S.Ct. 2057 (1994).

In the two Fifth Circuit cases on which the Appellate Division relied, Stockstill v. Gypsum Transportation, 607 F.2d 1112 (1979), cert. denied, 451 U.S. 969 (1981), and Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (1977), the stevedores, unlike here, were in control of the area of the accident and were in the best position to appreciate and avoid the danger.

In Stockstill, supra, the hazardous condition was a greasy rung on a ladder placed below deck and leading to a level of staging that had been earlier set up by the plaintiff's co-employees. The

plaintiff fell from the greasy ladder.

In Brown, supra, the plaintiff was injured when, while clearing a cargo hold, the portable platform he was lifting with a forklift fell on him.

While an independent contractor hired for its expertise may be expected to take full responsibility for its work on board ship (see, Stockstill v. Gypsum Transp., supra, and Brown v. Mitsubishi, supra), the same may not be said regarding the proper securing of a ladder that provides access to and from the ship.

CONCLUSION

Petitioners respectfully request that this Court issue a Writ of Certiorari to review and reverse the order and decision of the New York Supreme Court, Appellate Division, Second Judicial Department.

Dated: New York, New York
September 11, 1995

Respectfully submitted,

ALEXANDER J. WULWICK
Counsel of Record for
Petitioners
233 Broadway
New York, NY 10279
(212) 732-6566

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

Argued - November 18, 1994

___AD2d___

JOHN COPERTINO, J.P.
VINCENT PIZZUTO
FRED T. SANTUCCI
ANITA R. FLORIO, JJ.

93-02621
94-10506 **DECISION & ORDER**

Robert Vencius, et al.,
appellants,
v Morania Oil Tanker Corp.,
respondent.

Lawrence Goldhirsch, P.C., New York, N.Y. (Louis J. Kotlikoff of counsel), for appellants.

Kenny & Stearns, New York, N.Y. (James M. Kenny and Gino A. Zonghetti of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Richmond County (Cusick, J.), dated December 10, 1991, which denied the plaintiff's motion to set aside a jury verdict in favor of the defendant on the issue of liability, and (2) a judgment of the same court entered August 14, 1992, which, upon the jury verdict is in favor of the defendant, dismissing the complaint.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further

ORDERED that the respondent is awarded one bill of costs.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see, Matter of Aho,* 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see,* CPLR 5501[a][1]).

The plaintiff Robert Vencius was assigned by his employer to perform work on a barge owned by the defendant. Vencius was allegedly injured while disembarking from the vessel via a ladder. After a trial on the issue of liability only, the jury returned a verdict in favor of the defendant. The plaintiffs moved to set aside the verdict, contending that they had been precluded by the trial court from proving that the shipyard employment regulations of the Occupational Safety and Health Act (hereinafter OSHA) (*see*, 29 CFR 1915, et seq.) applied to the defendant's conduct.

By their terms, however, the responsibility for compliance with the OSHA regulations lies with the employer, and not with the owner of the vessel (*see*, 29 CFR 1915.3). It is undisputed that the defendant was neither Vencius's employer nor acting as Vencius's employer (*see*, 29 CFR 1915.4). The Supreme Court therefore properly concluded that the OSHA regulations in question did not apply to the defendant (*see*, *Stockstill v. Gypsum Transp.*, 607 F2d 1112, *cert denied* 451 US 969; *Brown v. Mitsubishi Shintaker Ginko*, 550 F2d 331; *Gallardo v. Westfal-Larsen & Co.*, 435 F Supp 484).

In light of our determination, we need not address the plaintiffs' remaining contentions.

COPERTINO, J.P., PIZZUTO, SANTUCCI and FLORIO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

December 5, 1994

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of June 1995

PRESENT,
HON. JUDITH S. KAYE,
Chief Judge, presiding.

2-10 Mo. No. 506
Robert Vencius, et al.,
Appellants,

v.
Morania Oil Tanker Corp.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the

appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/

Donald M. Sheraw
Clerk of the Court

Text of Statutes Involved

33 USC § 905(b) provides in pertinent part, as follows:

§ 905. Exclusiveness of liability (b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly

and any agreements or warranties to the contrary shall be void.

33 USC § 941(a) provides in pertinent part, as follows:

§ 941. Safety rules and regulations

(a) Safe place of employment, installation of safety devices and safeguards

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such

employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees.

29 CFR § 1915.72(a)(3) provides in pertinent part, as follows:

(3) Portable ladders shall be lashed, blocked or otherwise secured to prevent their being displaced.

29 CFR § 1915.74 provides in pertinent part, as follows:

Access to vessels.

(a) *Access to vessels afloat.* The employer shall not permit employees to board or leave any vessel, except a barge or river towboat, until the following requirements have been met:

(1) Whenever practicable, a gangway of not less than 20 inches walking surface of adequate strength, maintained in safe repair and safely secured shall be used. If a gangway is not practicable, a substantial straight ladder, extending at lease 36 inches above the upper landing surface and adequately secured against shifting or slipping shall be provided.

(c) *Access to barges and river towboats.*

(2) Unless employees can step safely to or from the wharf, float barge or river towboat, either [sic] a ramp in accordance with the requirements of paragraph (a) (7) of this section shall be provided. When a walkway is impracticable, a substantial straight ladder, extending at least 36 inches above the upper landing surface and adequately secured against shifting or slipping, shall be provided.

29 CFR § 1918.2 provides, as follows:

Scope and responsibility.

(a) The responsibility for compliance wit the regulations of this part is placed

upon "employers" as defined in §1918.3(c).

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

OPPOSITION

BRIEF

No. 95-417

Supreme Court U.S.
FILED
SEP 22 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT VENCIUS and DOROTHY VENCIUS,

Petitioners,

—against—

MORANIA OIL TANKER CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—SECOND DEPARTMENT

BRIEF OF MORANIA OIL TANKER CORP. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—SECOND DEPARTMENT

JAMES M. KENNY
Attorney for Respondent
KENNY & STEARNS
26 Broadway
New York, New York 10004
(212) 422-6111

12/19

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Respondent Morania Oil Tanker Corp. is a privately owned corporation, no shares of which are publicly traded.

TABLE OF CONTENTS

PAGE

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1 i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 2

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

PAGE

Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980) 4, 6

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 3

Crumrady v. The J.H. Fisser, 358 U.S. 423 (1959).... 4

Director, OWCP v. Perini No. River Associates, 459 U.S. 297 (1983) 1

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1978) 5, 6

Evans v. S/S CAMPECHE, Transportation Maritime Mexicana, 639 F.2d 849 (2nd Cir. 1981) 5, 6

Halcyon Lines, Inc. v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952)..... 4

Helaire v. Mobil Oil Co., 709 F.2d 1031, 1039-40 (5th Cir. 1983) 6, 7

Howlett v. Birkdale Shipping Co., S.A., ___ U.S. ___, 114 S.Ct. 2057 (1994) 2, 5, 7

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 76 U.S. 315 (1964)..... 4

Landon v. Lief Hoegh and Co., 521 F.2d 756 (2nd Cir. 1975) 5

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412 (1953) 4

Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963)..... 3

PAGE

Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) 3

Scindia Steam Nav. Co. v. de los Santos, 415 U.S. 156 (1981) 2, 3, 5, 6

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 3

Smith v. Eastern Seaboard Pile Driving Co., Inc., 604 F.2d 789 (2nd Cir. 1979) 4

Statutes and Rules:

29 C.F.R. § 1915.72(a)(3)..... 1, 6

29 C.F.R. § 1915.74 ..... 1, 6

29 C.F.R. § 1918.2 2

28 U.S.C. § 1254(1)..... 2

33 U.S.C. §§ 901-950 1

33 U.S.C. § 902(3) 1

33 U.S.C. § 905(b).....2, 3, 4, 5, 6, 7

33 U.S.C. § 941 2

H.R. 92-1441, *reprinted in* 1972 U.S. Code *Cong. & Admin. News*, 4698-99 6

STATEMENT OF THE CASE

Petitioner, Robert Vencius alleges injury in the course of employment by an independent contractor performing ship repair services aboard a vessel owned by respondent. Plaintiff was covered by the Longshore and Harbor Worker's Compensation Act [1972], 33 U.S.C. §§ 901-950, since he was an employee engaged in maritime employment as defined in § 902(3) and because his injury occurred while he was using an allegedly negligently secured portable ladder to disembark from a barge afloat in the navigable waters of the United States (*Director, OWCP v. Perini No. River Associates*, 459 U.S. 297 (1983)). For this reason, his suit was brought pursuant to Longshore Act § 905(b) which authorizes as the "exclusive remedy" of a covered employee suit for negligence against a "vessel" defined in the Act's § 902(21). Mr. Vencius' claim was submitted to a jury and resulted in a verdict exonerating respondent from liability after trial in Richmond County (New York) Supreme Court at which all reference to the provisions of the Safety & Health Regulations for Longshoring, 29 C.F.R. § 1915.72(a)(3) and § 1915.74, relating to access to vessels and securing portable ladders was excluded. Although petitioner now alleges that "[t]estimony at trial by respondent's shipyard manager was to the effect that its practice of securing the ladder differed depending on who was boarding the barge", in fact, he failed to establish either that the ladder was secured by respondent's employees or that anybody other than himself and his co-worker had been aboard the day he was hurt (R-97)[1]. He thus failed to prove that respondent was responsible for the manner in which the ladder was secured or that respondent's employees had control of access to the vessel at any time during the course of the contractor's work. What was, however, proven was that plaintiff's co-worker, who was described during trial as his "helper" (R 76, 162-63) climbed down the ladder first and plaintiff did not ask or direct him to hold it as he disembarked

---

[1] References are to the record on appeal in Supreme Court, Appellate Division—Second Department.

(R 128, 159) although had he done so his accident would, as the jury implicitly found, have been prevented. It might therefore be assumed that the jury concluded that access by means of the ladder secured the way it was did not, in all of the circumstances, constitute an unreasonably unsafe condition; and, hence, could not have believed that allowing its use was an improvident act. Petitioner's appeal to the New York State Appellate Division—Second Department was rejected and on June 14, 1995 leave to appeal to the Court of Appeals, the highest court of that State, was denied. Petitioner seeks certiorari pursuant to 28 U.S.C. § 1254(1) in order to have this Court "settle" a non-existent issue of "concurrent liability in negligence" of a Longshore Act employer and a § 905(b) vessel framed by the question whether the Occupational Safety & Health Regulations for Longshoring can be evidence of the negligence of a non-employing shipowner in suit by an employee of an independent contractor against that shipowner.

ARGUMENT

The petition should be denied because the precise question presented was settled by decisions of this Court in *Scindia Steam Nav. Co. v. de los Santos*, 451 U.S. 156 (1981) and *Howlett v. Birkdale Shipping Co., S.A.*, ___ U.S. ___, 114 S.Ct. 2057 (1994) in which, according to petitioner, the "issue was not addressed". The Safety & Health Regulations, by provision of 29 C.F.R. § 1918.2, apply only to "employers" and respondent was not Robert Vencius' employer. These regulations are issued by the Department of Labor pursuant to authority granted by Longshore Act § 941 which also imposes a safe place in which to work obligation upon employers. Petitioner nonetheless asserts that the regulations regarding securing portable ladders and vessel access should have been admissible as some evidence, not of his employer's negligence, but that of a third party. This is an argument which reflects a most fundamental mistake, one that not only contradicts controlling precedent of this Court but which also

ignores legal history as well as the intention of Congress in enacting § 905(b), the 1972 Longshore Act amendment (86 Stat. 1263, Pub.L. 92-576, § 18(a)) which authorizes his suit. There is not now, and there never has been, an issue, in any suit arising from shipboard injury brought by a Longshore Act employee against a shipowner, of "concurrent liability" of the accident victim's employer and the vessel. Instead, it has always been law that *either* the shipowner *or* the employer was liable not only for a covered employee's damages but for his worker's compensation as well. Since in this case there was no proof that petitioner's injury was caused by "obviously improvident" acts of his employer of which respondent was actually aware (see *Scindia Steam Nav. Co. v. de los Santos*, *supra*, 451 U.S. at 172-176), there is no basis in law since 1972 for a finding of vessel liability on account of the negligence of the marine contractor employer. Thus, other evidence offered to show that both were at fault simply cannot be relevant.

As was held in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974), Congress in enacting Longshore Act § 905(b) legislatively "overrule[d]" decisions of this Court making a shipowner liable without fault to a longshoreman or other harbor worker injured aboard ship on account of vessel unseaworthiness (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946)) as well as making the employer liable for indemnity for all its employee's damages in the event injury was caused by breach of its warranty of workmanlike performance (*Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956)). Under the law applicable in cases of shipboard injuries to Longshore Act employees such as petitioner prior to 1972, respondent's barge could have been found to have been unseaworthy and since the Safety & Health Regulations unquestionably would have been held applicable to Mr. Vencius' employer and violation was a *per se* breach of its warranty (see e.g., *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963)), respondent would have been relieved of all liability even had

its negligence under the formerly applicable General Maritime Law been proven. Under that law it was enough for a shipowner to establish its right to indemnity to prove that a Longshore Act employer's breach of warranty merely "brought into play" a condition of the ship causing injury negligently created by her crew (*Crumrady v. The J.H. Fisser*, 358 U.S. 423 (1959)); and contribution between joint tortfeasor was not permitted (*Halcyon Lines, Inc. v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953)). Prior to 1972, Longshore Act compensation benefits were capped at $70.00 per week (*Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980)) and, indeed, it has been recognized that creation by this Court of a right of Longshore Act employees to recover damages for unseaworthiness was the *result of* the inadequacy of the benefits the Act formerly provided (*Smith v. Eastern Seaboard Pile Driving Co., Inc.*, 604 F.2d 789, 794 n.3 (2nd Cir. 1979)). More importantly, the warranty of workmanlike performance and the employer's duty to indemnify the vessel for breach thereof was this Court's solution *after* it *rejected* argument raised by Mr. Vencius for "concurrent liability in negligence" of both the vessel and a Longshore Act employer; and, moreover, the obligation to pay all the employee's damages in addition to worker's compensation depended before 1972 not upon relative fault or even any fault at all but upon who, as between the vessel and the employer, was in the best position to prevent the occurrence of injury (*Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964)).

Concurrent liability after 1972 is also not possible since Longshore Act employers are insulated by provision of § 905(b) from claim of indemnity or contribution for damages awarded to their employees against vessels ("and the employer shall not be liable for such damages directly or indirectly and any agreements or warranties to the contrary shall be void"); and just as they had before 1972 prior to creation in 1956 of shipowner's right to indemnity (see, *Pope & Talbot, supra*, 346 U.S. at 412), employers today have a

"non-statutory" lien irrespective of their negligence causing an employee's injury on the proceeds of a longshoreman's or other harbor worker's § 905(b) suit (*Landon v. Lief Hoegh and Co.*, 521 F.2d 756 (2nd Cir. 1975); *Evans v. S/S CAMPECHE, Transportation Maritime Mexicana*, 639 F.2d 849 (2nd Cir. 1981); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 269-70 (1978)).

In sum, there is not today and has never been a concurrent liability rule applicable to the problems inherent where employees of independent contractors work and suffer injuries aboard vessels owned by third parties. Also, in part on account of the much diminished importance to covered employees of damage awards because of the vast increase in Longshore Act benefits since 1972, expansive notions of a shipowner's § 905(b) duty to longshoremen and others engaged in maritime employment aboard ships have been rejected by this Court because they contain the vice of encouraging unsafe work practices by employers. This is because the party typically in the best position to prevent injury—the employer who unlike shipowner is responsible to provide its employees with a safe place to work and is bound by the Safety & Health regulations although the vessel is not—as a result of being immune from liability for damages and beyond that entitled, through its lien, to recapture compensation benefits paid to its employee even though injured as a result of its negligence, would be encouraged to curtail effort to ensure workplace safety. This recognition was confirmed in the holding of *Scindia Steam Nav. Co. v. de los Santos*, *supra*, a case in which this Court specifically held that the safe place to work obligation is the employer's (451 U.S. at 170) and that the Safety & Health Regulations do *not* apply to third party vessels (*Ibid.*). In fact, it is exactly this gloss on the *Scindia Steam Nav. Co. v. de los Santos* holding (see, 451 U.S. at 180-181, concurring opinion, *Powell, J.*) which is law in § 905(b) cases since decision in *Howlett v. Birkdale*, *supra*. In that case, this Court held that mere knowledge of a longshoreman's employer of an unsafe workplace condition of

which the shipowner's employees were also aware was a basis for a grant of summary judgment in a § 905(b) case in favor of the vessel. This narrow construction of what constitutes "negligence of a vessel" in a Longshore Act employee's suit is doubtlessly correct: (1) Congress in adopting the 1972 Longshore Act amendments which, among other things, increased maximum compensation benefits from $70.00 to more than 10 times that amount today, *said* that it intended that *employer* liability for increased benefits, which in the event of a finding of liability in its employee's suit under § 905(b) it escapes through assertion of its lien, serve as the incentive "to assure the fullest measure of on-the-job safety" (see, H.R. 92-1441, reprinted in 1972 U.S. Code *Cong. & Admin. News* 4698-99); and (2) In *Bloomer v. Liberty Mutual Insurance Co., supra*, 445 U.S. at 87, this Court recognized that even before 1972 when benefit levels were very much lower, third party suits by longshoremen often enriched, not the accident victim, but his attorney.

Petitioner's rejected offer to prove "negligence" of petitioner would, of course, establish breach by his lien-holding employer of a duty created not only by regulation but also § 941 of the Longshore Act itself. In fact, to allow introduction of proof of breach of regulation for the purpose for which it was offered could have permitted, through its lien, petitioner's employer, to escape "scot-free" (*Edmonds, supra*, 443 U.S. at 270) as a *result of* proof establishing that it had violated law. This would be a "palpably unjust result", one which "[o]ur judicial system should not be obliged to countenance" (*Evans, supra*, 639 F.2d at 864, concurring op., *Friendly, J.*)). In fact, since *de los Santos* holds (*supra*, 451 U.S. at 172) that the vessel can ordinarily rely on the safety responsibility of an independent contractor to its employees including the very obligation petitioner would impose upon the vessel, it is obvious that the sole relevance of 29 C.F.R. §§ 1915.72(a)(3) and 1915.74 to petitioner's case would have been to establish—because without respondent's knowledge his employer failed to comply (see, *Helaire v. Mobil Oil Co.*, 709 F.2d 1031,

1039-40 (5th Cir. 1983))—that respondent breached no duty owed to him as a matter of law, precisely the holding of *Howlett v. Birkdale Shipping Co., supra.* Thus, petitioner complains in this Court, as he did in the courts below, of a "mistake" of law denying him the opportunity to offer further proof why respondent was *not* liable.

CONCLUSION

The Safety & Health Regulations were properly excluded since not relevant for the purpose offered. It is also respectfully suggested that only rarely will this Court see a petition for a writ of certiorari in which the issue presented is more fundamentally and completely misunderstood. In New York State, contribution between tortfeasors is permitted based upon relative fault; and the employer is credited for the compensation benefits it has paid in the event the plaintiff is its employee, of course. Nonetheless, by failing to recognize that Longshore Act law is different petitioner seeks no less than to have this Court undo the will of Congress expressed in § 905(b). The petitioner should be denied.

Dated: New York, New York
September 21, 1995

Respectfully submitted,

JAMES M. KENNY
Attorney for Respondent
KENNY & STEARNS
26 Broadway
New York, NY 10004
(212) 422-6111